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No.....

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In The
Supreme Court of the United States
October Term, 1983

GLEN SUTHERLAND,

Petitioner,

v.

THE STATE BAR OF TEXAS,

Respondent.

On Petition of Certiorari to the Supreme Court of Texas

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Question Number One

Whether Congress had the intent to grant jurisdiction and power to the Federal District Courts to remove elected government officials and officers, (State and Federal), and the power to dissolve or reorganize governmental units under the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) 18 U.S.C. 1962, by intending to include all "governmental entities" under the Statute as "enterprises" (18 U.S.C. 1961 (4)), since the mandatory criminal penalties of 18 U.S.C. 1963 (a) as applied to 1962 and the civil remedies allowed by the statute are unconstitutional because the criminal penalties part of the statute requires the mandatory removal of the office holder by the Federal District Judge and the civil remedies part allows discretionary reorganization of that Governmental unit.

NOTE: QUESTION ONE and QUESTION TWO will be argued together for clarity and convenience.

Question Number Two

Whether the RICO statute, 18 U.S.C. 1961 through 1968, is unconstitutional because the inclusion of the statutory or constitutional name of the Office, Government Unit, Court or Branch of the government as an indictment "enterprise" (18 U.S.C. 1961 (4)) under the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) 18 U.S.C. 1962 and the mandatory criminal penalties of 18 U.S.C. 1963 (a) as applied to Section 1962 requires the unconstitutional mandatory removal of the office holder by the Federal District Court and the civil remedies (1964 a) allows an unconstitutional dissolution or reorganization of that Governmental unit by the Federal District Court.

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GLEN SUTHERLAND,

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THE STATE BAR OF TEXAS,

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On Petition of Certiorari to the Supreme Court of Texas

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PETITION FOR CERTIORARI

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JURISDICTION

This case originated upon the filing of a civil suit by the State Bar of Texas to take by disbarment proceedings Petitioner's law license. The only basis for this action was the conviction of Petitioner under 18 U.S.C. 1962 (d). It

was necessary under the Texas Statute, V.A.C.S. art 320a-1, §16 (p. 7), for removal of the license for the State Bar to prove that the conviction was by a Court of competent jurisdiction. Also Petitioner presented to the State Court the question of due process and all the matters raised here. The Judgment of the District Court was entered in April, 1981. Petitioner raised all of the questions presented in this Petition for Certiorari before the Trial Court and each of the Texas Appellate Courts. The Trial Court and the Appellate Courts could not have decided the case against Petitioner without ruling against him on these two questions presented here. The Court of Appeals ruled against Petitioner on these questions in its decisions dated November 30, 1983. A copy of said opinion is included in the Appendix attached hereto and made a part hereof and marked Exhibit "A". This decision was appealed to the Supreme Court of Texas and it decided against Petitioner without an opinion. The Supreme Court of Texas denied Petitioner's Motion for Rehearing on March 28, 1984. A copy of the letter from the Supreme Court is included in the Appendix attached hereto and made a part hereof and marked Exhibit "B". This was a final decision against Petitioner concerning the questions now before this Court. Petitioner has exhausted all of his remedies in the State of Texas. Said Courts could not have ruled against Petitioner without ruling against him on the questions now presented to this Court. Jurisdiction for this Court is invoked under "28 U.S.C. 1257 (3)". The decisions of the State Courts below conflict with the decisions of this Court concerning due process of law and separation of powers in the Government. There is a conflict between the Circuit Courts as to the proper interpretation of the RICO statute concerning naming all Government entities as enterprises.

THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

This case presents issues of great importance to this country and our constitutional framework of government. The basic question involved is the separation of powers between branches of the Federal Government and Federal and State relationships. The decisions of the State Courts below conflict with the decisions of this Court concerning due process of law and the separation of powers. Specifically the problem arises under the RICO statute which has been improperly applied to give unconstitutional results. It concerns whether or not the constitutional and/or statutory name of the Office, Government Unit or a branch of the Government can be named as an "enterprise" under the RICO Statute, 18 U.S.C. 1962 (c) and if it can, the grave consequences of so doing. As pointed out by the Court in *U.S. v. Mandel,* 415 F. Supp. 977, 1021 (1976), the results of including a branch of the Government such as the State of Maryland as an "enterprise" under RICO requires a mandatory and unconstitutional forfeiture of office, allows the unconstitutional dissolution of the State Government and allows suits for treble damages against the Government and allows a startling departure from the traditional understanding of federal-state relationships.

We believe this Court can correct the problem without impairing the purpose of the statute by adopting the reasoning in the *Mandel* Court and the En Banc decision of *U.S. v. Thompson,* 685 F. 2d 993, 994. Should this Court hold that it was not the intent of Congress to include the Constitutional or Statutory name of an Office, Govern-

mental Unit, or a Branch of the Government as an "enterprise" under 18 U.S.C. 1961 (4) and that indictments should be drawn up naming a "group of individuals using the office of ....." as the "enterprise" when a Governmental Unit is involved, then RICO can be used to try persons engaged in organized crime involving the Government without being unconstitutional. The decisions of the above Courts conflict with the decision of *U.S. v. Angelilli*, 660 F. 2d 23, 33 (2nd Cir. 1981).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

18 USC 1961 (4)

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

18 USC 1962 (c) & (d)

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.
>
> Added Pub.L. 91—452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.

18 USC 1963 (a)

§ 1963. Criminal penalties

(a) Whoever violates any provisions of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 USC 1964 (a)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 USC 1964 (c)

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

U.S. Constitution Art. 1, Section 3, Clause 6

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. Constitution Art. 1, Section 5, Clauses 1 & 2

> Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.
>
> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

U.S. Constitution Art. 2, Section 4

> Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Constitution Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Civil Statutes: Article 320a-1, Section 16

Sec. 16. No attorney shall be suspended from practice, except by the attorney's concurrence under an order of suspension entered by the grievance committee, until such attorney has been convicted of the charge or charges for disbarment pending against him or her in a court of competent jurisdiction. Provided, however, that on proof of conviction of an attorney in any trial court of competent jurisdiction of any felony involving moral turpitude or of any misdemeanor involving the theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction. . . . On proof of final conviction of any felony involving moral turpitude or any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him or her.

STATEMENT OF THE CASE

This is an action where the Petitioner's Texas law license was removed by disbarment by a State Court under a State civil statute because the Petitioner was convicted under the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) 18 U.S.C. 1962 (d) Under the said Texas civil statute the Court that renders the judgment of conviction must have jurisdiction. The named enterprise under the indictment was the Municipal Court of El Paso, Texas. If the said statute does not include "governmental entities" as enterprises then the conviction was without jurisdiction and is void. The jurisdiction question was raised at the Trial of the license revocation case and this constitutional question was appealed to the highest Court of the State of Texas. A decision upholding the license revocation cannot stand for a lack of jurisdiction if the said Federal Statute does not include "governmental entities" as "enterprises" or if the Federal Statute is unconstitutional. The Texas State Courts ignored these constitutional questions. All State remedies have been exhausted.

The decision of the State Courts below conflict with the holdings of this Court concerning due process of law and the separation of powers under the Constitution.

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REASONS WHY THE WRIT SHOULD BE GRANTED

Question Number One Restated

Whether Congress had the intent to grant jurisdiction and power to the Federal District Courts to remove elected government officials and officers, (State and Federal)

and the power to dissolve or reorganize governmental units under the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) 18 U.S.C. 1962, by intending to include all "governmental entities" under the Statute as "enterprises" (18 U.S.C. 1961 (4)), since the mandatory criminal penalties of 18 U.S.C. 1963 (a) as applied to 1962 and the civil remedies allowed by the statute are unconstitutional because the criminal penalties part of the statute requires the mandatory removal of the office holder by the Federal District Judge and the civil remedies part allows discretionary reorganization of that Governmental unit.

NOTE: QUESTION ONE and QUESTION TWO will be argued together for clarity and convenience.

Question Number Two Restated

Whether the RICO statute, 18 U.S.C. 1961 through 1968, is unconstitutional because the inclusion of the statutory or constitutional name of the Office, Government Unit, Court or Branch of the government as an indictment "enterprise" (18 U.S.C. 1961(4)) under the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) 18 U.S.C. 1962 and the mandatory criminal penalties of 18 U.S.C. 1963 (a) as applied to Section 1962 requires the unconstitutional mandatory removal of the office holder by the Federal District Court and the civil remedies (1964 a) allows an unconstitutional dissolution or reorganization of that Governmental unit by the Federal District Court.

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ARGUMENT AND AUTHORITIES

Questions One and Two will be argued together for clarity and convenience.

This case is the result of a conviction of Petitioner in Federal Court on an indictment under 18 U.S.C. 1962 (d). On the basis of such conviction, and that alone, the State Court brought action under State law to disbar Petitioner. Petitioner attacks the underlying Federal conviction as will be discussed.

In the underlying Federal case the "MUNICIPAL COURT OF EL PASO, TEXAS" was named the "enterprise" in a RICO conspiracy indictment which resulted in an unconstitutional proceeding and conviction in Federal Court. This conviction was used as the necessary proof that the Petitioner had been convicted of a felony in order for the State Court, under Texas law, to have jurisdiction to remove the Petitioner's Texas law license. This is the only felony or crime involving moral turpitude that Petitioner has ever been accused of committing. His prior record and reputation had no blemish. Without this conviction Petitioner has a right to practice law in the State of Texas. The name stated in the indictment is the official and legal name for the Court. This deprived the Petitioner of due process of law under the 5th and 14th Amendments since the RICO statute (18 U.S.C. 1962) either did not include a branch of the Government as an "enterprise" or the statute was and is unconstitutional.

At least two Federal Courts have recognized the fact that to name some "governmental entities" as "enterprises" under the said statute was not the intent of Congress because it would lead to absurd results. *U.S. v. Mandel,*

415 F. Supp. 997 (1976) and *United States v. Thompson,* 669 F. 2d 1143 (6th Cir. 1982).

An interpretation of RICO that allows the legal name of a branch of the Government to be an "enterprise" under 18 U.S.C. 1962 (c), as was done in the conviction used as a basis for the removal of Petitioner's law license, presents at least three constitutional questions: (1) The mandatory duty of a Federal District Court to remove government officials by unconstitutional means (18 U.S.C. 1963), (2) The right of a Federal District Court to reorganize or dissolve a Governmental unit or a branch of the Government (a legislative function under the Constitution) 18 U.S.C. 1964, And (3) the statute allows the infringement of Federal-State relations in an unconstitutional manner.

For these reasons, plus the fact that it allows an individual to sue the government (enterprise) for treble damages under the civil penalties (18 U.S.C. 1964), it has been held that it was not the intent of Congress to include the "government" as an enterprise under RICO. These problems were pointed out by the District Court in *U.S. v. Mandel,* 415 F. Supp. 997 (1976), supra, when an indictment was returned naming the "State of Maryland" as an enterprise back in 1976. The Government recognized the correctness of this decision and did not appeal it to the Fourth Circuit. Since that time the Government has ignored this warning and continued to indict people, including Petitioner, under the theory that "enterprise" includes all government entities. It is possible that this is done to avoid the problem of proving an actual organization (other than a government entity) and its nexus with interstate commerce. 18 U.S.C. 1962 (c).

The Supreme Court of the United States has not yet ruled on this question and has not considered this "enterprise" question and the constitutional problems it presents. The Fourth Circuit case of *U.S. v. Baker,* 617 F.2d 1060, 1061 (4th Cir. 1980) considered the case of *Mandel,* supra, and states, in effect, that it is not overruling the *Mandel* case (also 4th Cir.). In reference to this it said:

> "While the correctness of that Court's holding is not before us, since this case does not address the status of a state under RICO, . . ."

The *Baker* Court goes on to point out that the "Wilson County Sheriff's Department" clearly qualifies as either a "legal entity" or a "group of individuals associated in fact". As we read this case, it means that the name "Sheriff's Department" was not the *statutory* name for a governmental unit. The "Sheriff's Department" as used in the indictment as the "enterprise" was interpreted to be "a group of people" and not a branch of the Government. In other words "Sheriff's Department" is not to be used in the same sense as the "State of Maryland" and does not mean the same as the legal name for the branch of Government created by statute and named "Sheriff". This is similar reasoning to that of *U.S. v. Thompson,* 669 F. 2d 1143, supra.

This may seem to be a distinction without a difference but we believe that it makes a big difference as we will show in this brief. For example, in *Mandel* it was recognized that if a Governor is indicted under RICO and the "State of Maryland" is named as the "enterprise", then upon conviction it is the mandatory duty of the District Judge to remove that Governor from office and the

Federal District Court further has the right to reorganize the State of Maryland. We submit that this surely is unconstitutional. On the other hand if under the same facts the "enterprise" named in the indictment is the "office of the Governor" (not the legal name of a branch of government) or if "a group of people using the office of the governor" is named in an indictment as the "enterprise", then the District Court does not have the mandatory duty to remove the Governor from office or the right to reorganize the State or any branch of the State but can punish the individuals alone, which is the purpose of the statute. In other words, if the "Office of the Governor" is a constitutional or statutory title then the Governor *must* be removed from his official duties and his office, on the other hand, if the "Office of the Governor" is just a group of people then the Governor must be removed from the "enterprise" or from doing further acts with the group of people named. The application of this reasoning is presented in the En Banc decision of *U.S. v. Thompson,* 685 F. 2d 993, 994, supra. The holding of *Thompson* and its recommended method of indictment allows for the indictment and conviction of persons who violate RICO by wrongfully using a Government office and does it constitutionally. The only difference is that it requires the Prosecution to actually prove statutory elements of RICO, i.e. the existence of an organization (other than government) and that organization's nexus with interstate commerce. Clearly this requirement was the intent of Congress and it would be easy to do where there is a "mafia" type organization. The use of a group of persons involved in the crime as the enterprise" is discussed in *U.S. v. Elliott,* 571 F. 2d 880 (5th Cir. 1978).

The "Racketeer Influenced and Corrupt Organizations" statute of Title 18 U.S.C. contains Sections 1961 to 1968 inclusive, Section 1963, *"Criminal Penalties"*, provides, in substance, for the *mandatory forfeiture*

> *"to the United States* * * * (2) *any interest in* * * * *or contractual right of any kind affording a source of influence over any enterprise* * * * he has participated in the conduct of"; (Emphasis added.)

18 U.S.C. 1964 Section (a), "Civil Remedies" provides, in substance, for the reorganization of the "enterprise":

> The district courts of the United States shall have jurisdiction * * *; or ordering dissolution or reorganization of any enterprise, * * *."

Section (c) of the above "Civil Remedies" statute provides, in substance for the remedy of triple damages as follows:

> "(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fees."

Congressional Intent

The U.S. Supreme Court in a recent decision concerning the separation of powers, *Immigration and Naturalization Service v. Chadha,* 75 L. Ed. 903, 51 LW 4917 states:

> ". . . Congressional authority is not to be implied. . . ."

The Federal District Court in *U.S. v. Mandel,* 415 F. Supp. 997, 1021 (1976) recognized the proper application

of this statute when it discussed the question of whether or not Congress intended that Government Entities be included in RICO as "Enterprises" particularly in reference to Sections 1963 and 1964. In headnote 42 on page 1021 the Court states:

> "The remedies provided for in the *civil and criminal provisions* clearly imply that Congress had only private entities in mind when defining 'enterprise'. *The criminal penalties include fine, imprisonment and forfeiture;* the civil penalties, modeled on the antitrust statute, provide for private treble damages and actions and such injunctive relief as divestiture and forfeiture. It could hardly be contended that a private citizen of a state, aggrieved by the 'racketeering acts' of an official in conducting the state, could bring a treble damage action against that official and *require forfeiture of office and dissolution of the state government. The interpretation of this statute to include 'states' within the meaning of 'enterprise' would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships. Unless Congress has clearly indicated its intentions to 'alter sensitive federal-state relationships', courts should be reluctant to give ambiguous phrases within a statute that effect. REWIS v. U.S.,* 401 U.S. 808, 812, 28 L.Ed. 2d 493, 593, 596 & 597 (1971)." (Emphasis added.)

At a later date another Court considered this statute. It was pointed out by a panel of the Sixth Circuit in *U.S. v. Thompson,* 669 F. 2d 1143, 1145 (1982) that if RICO applies to governmental entities as the named enterprises *the District Court has the right under the civil penalties* (18 U.S.C. 1964(a)) *to reorganize the entity*

named as the enterprise in the RICO conviction and *remove the State official.* That part is quoted as follows:

> "Application of RICO's civil remedies to state government enterprises would result in anomalous results: district courts would not only be authorized to 'prohibit any person from engaging in the same type of endeavor as the enterprise engaged in . . .,' but also to order 'dissolution or reorganization of any enterprise. . . .' 18 U.S.C. Section 1962(a) (emphasis added). To hold that Congress has authorized federal district courts to dissolve or reorganize the offices of the governors of the states, and did so sub silentio, is shocking and absurd."

The proper interpretation of this statute requires recognition of the holding of the Supreme Court in *United States v. Turkette,* 452 U.S. 576, 69 L. Ed. 2d 246, 253, that statutes should be interpreted so that:

> ". . . absurd results are to be avoided and internal inconsistencies in the statute must be dealt with."

If it was the intent of Congress to include government entities such as a State and all its subdivisions as "enterprises" under the statute then, because there is no limitation, logic demands that the statute apply equally to *all* government officials, State and Federal, and includes U.S. Congressmen, U.S. Senators, the President, and his cabinet.

As is apparent from the language of the *Mandel* Court the RICO mandatory forfeiture provision means that the interest the felon has in the enterprise goes to the U.S. Government. If you apply the mandatory forfeiture part of the statute of the convicted person's interest in the "governmental enterprise" to the *United States Government* you again get absurd results. Does the United States

receive the interest that a Governor has in his position as Governor of the State (the named enterprise)?

The Supreme Court in a recent case June 21, 1983, *Immigration and Naturalization Service, Appellant v. Jagdish Rai Chadha, et al.*, 75 L. Ed. 903, 51 Law Week 4907, 4915, holds that the Constitution prohibits one branch of the Government from having the right, at its discretion, to control another branch.

In *Mandel,* the indictment alleged the Enterprise to be the entire state of "Maryland", therefore the Court was concerned with "Federal-state relationship". If the "Congress of the United States" were named the "Enterprise" (instead of Maryland) in an indictment it is even more obvious that it was not the intent of Congress to include all governmental units as "enterprises". It was possible to name "Congress" as an enterprise in the "abscam cases", had prosecutions been brought under RICO, 18 U.S.C. 1962. The RICO statutory definition of "Enterprise", Sec. 1961 (4), does not specify that a governmental entity is included or intended to be included. The Government insists that because the definition is broad, all Government entities are included by implication. This is prohibited in *Immigration and Naturalization Service, Appellant v. Jagdish Rai Chadha, et al.*, 75 L. Ed. 903, 51 Law Week 4907, 4915, supra.

Appellant submits that it was not the intent of Congress to include government units with a statutory or constitutional name as enterprises. If they had, we believe they would have exempted those Government offices where it would be unconstitutional for a Federal District Court to remove the officials from office and those gov-

ernmental units where it would be unconstitutional for the District Court to dissolve or reorganize the governmental unit and they would have exempted the Government from treble damages.

The RICO Statute, 18 U.S.C. 1963, seems to require that the criminal penalties be applied even before a final conviction. The "civil remedies section" provides for the discretionary removal of the official and dissolution of the "Enterprise" as a *preventive measure*. 18 U.S.C. 1964 (a) states:

> "The district courts of the United States shall have jurisdiction to *prevent* and restrain violations . . . by issuing appropriate orders . . . ordering any person to divest himself of any interest . . . in any enterprise . . . or ordering dissolution or reorganization of any enterprise. . . ." (Emphasis added)

Let us assume that alcoholism (as happened to Congressman Jenerette in an abscam bribery case) is found to be one cause of conspiracies to take bribes in violation of Section 1962. A measure to *prevent* violations of Section 1962 would be to divest all alcoholics of their Government offices under 18 U.S.C. 1964 (a). The Statute appears to allow that action by a Federal District Court. This is an extreme example but it adequately illustrates the point. One wonders what could happen to the Federal Reserve Board, the I.C.C. or the I.R.S. if preventive measures became necessary in the opinion of a District Court. We believe, of course, that this is unconstitutional.

The allegation that the "Municipal Court of the City of El Paso, Texas" is an enterprise under the law is erroneous and therefore the Indictment fails to allege an offense. Appellant submits further that if the intent was

to include the governmental entities named in the statutes as enterprises, then the statute is unconstitutional since the Constitution provides other exclusive methods of removing Government officials and of dissolving and reorganizing the Government.

The Sixth Circuit Court in *U. S. v. Thompson*, 669 F. 2d 1143, 1145 (1982), supra in a panel decision followed the same reasoning as the Mandel Courts on the *"civil penalties"* part of the statute and ruled that it was not the intent of Congress to include Government entitles as "enterprises" in 18 U.S.C. 1962(c). They did not consider the *mandatory criminal penalties.* This panel decision was modified by an En Banc hearing.

Under the *Thompson En Banc Court,* 685 F. 2d 993, 994 decision it was not necessary to determine whether or not "governmental entities" were "enterprises" under the statute. They found, in effect, that the "Enterprise" named in the indictment was the "Office of the Governor" and that this was not a state (governmental) entity by definition i.e. the law provided for a "Governor" but no "Office of the Governor". The Circuit Court found that the indictment meant that the "Enterprise" was a group of people who were in the "Office of the Governor."

It is clear that the United States Congress did not intend to be named an enterprise under 18 U.S.C. 1961, where the District Judge is vested with a mandatory removal duty of members and the discretionary powers of dissolution and reorganization of Congress to prevent violations of RICO. The removal of the said officials is reserved for each house in the Constitution, Article 1 Section 5. It is ridiculous to believe that Congress meant to submit itself to such a drastic change in Constitutional law.

Constitutionality of Such Application

As we know, the mandatory forfeiture of office provision is unconstitutional if applied to Federal, State and Local government officials.

The Fifth Circuit has held that the forfeiture provision of the *criminal penalties* is mandatory and the Court does not have the right to suspend an 18 U.S.C. 1963 forfeiture. *United States v. L'Hoste,* 609 F. 2d 796, 813 (5th Cir. 1980). The Fifth Circuit also held that the forfeiture of an office either elected or appointed is required. *U.S. v. Rubin,* 559 F. 2d 975, 991 (5th Cir. 1977).

The Constitution of the United States provides the *exclusive method of removal* by impeachment for the President, Vice President and all Civil Officers of the United States in Article 2 Section 4. It does not provide for removal by a District Court. The procedure for impeachment is set out in Article 1, Section 3, Cl. 6.

Had the members of congress in the "abscam" cases been convicted of conspiracy to violate RICO under 18 U.S.C. 201 (bribery), and the U.S. Government had been named as the enterprise, then the District Court would have *been required* to remove the Congressmen and Senators from office under 18 U.S.C. 1963 and would have the right under 18 U.S.C. 1964 to reorganize the United States Congress and the committees including the Judiciary Committee. Of course, the removal of the officials from *their influence over the enterprise* is a violation of the constitution since Article 1 Section 5 of the constitution provides for the exclusive method of removal of Congressmen and Senators from their office. This does not include removal by a District Court.

The Constitution provides for separation of powers of the Executive, Legislative, and Judicial branches of Government. See 16 CJS 483, Constitutional Law section 104. *National Treasury Employees v. Nixon,* 492 F. 2d 587; *U.S. v. Ream,* 491 F. 2d 1243.

The Statute takes on an even more absurd meaning when you apply both the criminal and civil penalties to government entities and especially to Federal Officials. For instance, in the Watergate situation, if President Nixon, his Attorney General and several of his government officials had been convicted of conspiracy to violate RICO in planning burglaries including the one on the Headquarters of the Democrats in violation of State laws or the obstruction of justice in violation of Federal law, 18 U.S.C. 1503, and the indictment named the United States as the enterprise, (as was possible under the facts) then it would have become the mandatory duty of the Court to apply the criminal penalties. The Court would have to remove the President of the United States from office in order to forfeit his influence over the enterprise and could, if the Court felt the circumstances warranted it, do a little reorganizing of the Federal Government. (Could the Democratic party sue the government under RICO for treble damages as a result of Watergate? Is this a special statute allowing (civil remedies) a suit against Ex-President Nixon and/or his conspirators?)

The constitutional questions concerning the application of RICO, 18 U.S.C. 1962(c), and its mandatory "criminal penalties" to the Government or branches of Government as "Enterprises" were not raised or decided in *U.S. v. Sutherland,* 656 F. 2d 1181 or in any other Fifth Circuit Court decision. The prior question answered by some of

the Courts (other than in the Mandel and Thompson Courts) was whether or not the statute was *broad enough* to include "government entities". This has nothing to do with the constitutional questions that it is *too broad and too vague,* if applied to *all* government entities. The Fifth Circuit in the *Sutherland* case, supra, stated that the RICO statute is *broad* enough to include the 5th Circuit itself, 656 F. 2d 1181, at 1194. However, it does not discuss the possibility of a Federal District Court's removal of one of its members or the reorganization of the 5th Circuit Court by a Federal District Court.

It would be the unconstitutional duty of a Federal District Court to remove the President of the United States if he were convicted of conspiracy to obstruct justice under RICO as could have been done under the Nixon Presidency (if RICO includes government entities).

Other court decisions seem to be based upon finding that the indictment "enterprise" was not named as a government unit since the name was not a statutory name. They state that the enterprise named was a "group of people". We believe that the *Municipal Court of the City of El Paso, Texas* is similar to the State of Maryland since they are both legal and proper statutory names. We submit that a properly named Court cannot legally be defined as just a "group of people" for any purpose and to attempt to do so is asking for disastrous results.

The conflict between the circuits is between the 4th Circuit MANDEL, the 6th Circuit THOMPSON and the 2nd Circuit which exists from the 2nd Circuit holding that *all* government entities are "enterprises" under the statute. The Second Circuit does not attempt to find that the "enterprise" is a group of people rather than a govern-

ment unit. That case is *U.S. v. Angelilli,* 660 F. 2d 23, 33 (2nd Cir. 1981). The Court attempts to dismiss the importance of the constitutional question raised in MANDEL about the mandatory removal of government officials by stating that:

> "In most instances, the issue would be moot since convicted felons are usually removed from office automatically".

Clearly, *any* removal of the members of Congress from office and/or the President by a Federal District Judge was not the intent of Congress or the President concerning their offices since it would be unconstitutional. We believe Congress did not intend this result concerning any statutory governmental unit and it is clear that Congress would prefer the old constitutional method of removing its own members.

We believe the above implication, that in most instances the issue is moot therefore the statute is Constitutional, is like declaring that a statute making slavery legal is constitutional since most people these days do not believe in slavery and very few slaves would be bought. The Angelilli case should be overruled for obvious reasons.

The RICO statute does not specifically include governmental entities that are named in Constitutions or statutes and if these governmental units are included then the RICO statute is unconstitutional.

Constitutional Application Is Possible

The en banc decision in *U.S. v. Thompson,* 685 F.2d 993, 994, points out that it is not necessary to name a government entity as the enterprise and states that this disrupts comity in federal-state relationships. It states that the indictment should have used different language:

> "In this repect, the language which could and we believe preferably should have been employed, would have alleged that the three defendants constituted a 'group of individuals associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee' for the particular racketeering activities alleged in the indictment."

This type of indictment would provide for excellent results if there were actually a Mafia-type organization that effected interstate commerce. Indictments of the nature set out by the Sixth Circuit would not only be constitutional, but would have the same effect on preventing Mafia-type crime.

Now is the time to answer the foregoing questions and to make clear the proper application of RICO. This could reduce the Federal Court load in both civil and criminal matters.

—o—

CONCLUSION

It is beyond belief that Congress would provide in a statute that a State could be abolished by a District Court or that (if one of its members were convicted under RICO and Congress was named as the enterprise) a District

Court must remove a member from Congress and could reorganize that body. It is also clear that they did not intend for a District Court to have the power to reorganize a state or any subdivision of a State without any guidelines as to when or how the Federal District Court should do this. Also we do not believe that Congress meant this statute to be one intended to give individuals the right to sue the Government and/or Government Officials for treble damages. If we are wrong and Congress did intend to include government units as named by the legislative bodies in the statute as enterprises and included the above stated penalties and forfeitures against Government units, then the statute is unconstitutional.

If the said statute includes the described government entities as enterprises it is unconstitutional. If it doesn't, then the conviction against Petitioner is void and cannot support this disbarment action. To rule otherwise ignores the very foundation of Due Process and the 14th and 5th Amendments.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, THE Petitioner prays that this Court grant a Writ of Certiorari to the Supreme Court of Texas.

Respectfully submitted,

/s/ Texas S. Ward
Attorney of Record for Petitioner
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1010 Bassett Tower
El Paso, Texas 79901
(915) 533-5697 or 523-4133

APPENDIX

EXHIBIT "A"

COURT OF APPEALS
El Paso

No. 08-82-00229-CV

GLEN SUTHERLAND,

Appellant,

vs.

THE STATE BAR OF TEXAS

Appellee.

Appeal from 34th District Court
of El Paso County, Texas

OPINION

(Filed December 1, 1983)

This is an appeal from a statutory disbarment proceeding which was based upon a final felony conviction for a crime involving moral turpitude. Article 320a-1, sec. 16, Tex.Rev.Civ.Stat.Ann. (Vernon Supp. 1982). We affirm.

Glen Sutherland, formerly a municipal judge in El Paso, was indicted by a federal grand jury. The gist of the pertinent allegation was that he engaged in a "ticket fixing" scheme for profit. Final indictment alleged a violation of 18 U.S.C.A. sec. 1962(d), Conspiracy to Engage in Racketeering Activities as defined in 18 U.S.C.A. sec. 1962(c). The underlying Texas offense under the conspiracy allegation was alleged to be "Bribery" as described in Tex.Penal Code Ann. sec. 36.02 (Vernon Supp. 1982). After trial, a verdict of guilty to the pertinent indictment

was returned and Mr. Sutherland was sentenced to two years imprisonment. He appealed the federal conviction to the Fifth Circuit Court of Appeals and the conviction was affirmed. United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), cert. denied, 455 U.S. 949, 71 L.Ed. 2d 663, 102 S.Ct. 1451 (1982).

After the conviction and subsequent imprisonment, the State Bar of Texas sought disbarment under the provisions of Section 16 of the State Bar Act, Article 320a-1, supra, which states in part the following: "[o]n proof of final conviction of any felony involving moral turpitude—the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him or her." Based upon the formal petition, the certified copies of the indictment, judgment and probation/commitment order, denial of stay of mandate and Section 16 of the Act, the trial court entered the judgment disbarring the Defendant.

The gist of the Defendant's points on this appeal are that the federal prosecution was faulty and in excess of its jurisdiction. The Defendant tactically recognizes that this is a collateral attack upon the federal judgment. In that area, principles of comity dissuade state courts from permitting such attacks upon those judgments. Ex parte Garcia, 560 S.W.2d 948 (Tex.Crim.App. 1978). The Defendant argues that to be convicted under the provisions of the Racketeer Influenced and Corrupt Organizations statute, one must be involved in an enterprise affecting interstate commerce; and he claims that an "enterprise" does not include a government entity, which in this case is the Municipal Court of the City of El Paso. That argu-

ment is overruled by the opinion and the many cases cited in United States v. Thompson, 685 F.2d 993 (6th Cir. 1982), cert. denied, — U.S. —, — L.Ed.2d —, 103 S.Ct. 494 (1982). The holdings in the Defendant's own cited authorities reject the balance of his jurisdictional contentions in this case.

The judgment of the trial court is affirmed.

PER CURIAM

November 30, 1983

Before Panel No. 1
Ward, Osborn and Schulte, JJ.

(Rule 452, Tex.R.Civ.P.)

EXHIBIT "B"

THE SUPREME COURT OF TEXAS
P.O. Box 12248 Capitol Station
Austin, Texas 78711

(Filed March 30, 1984)

Chief Justice
Jack Pope

Justices
Sears McGee
Charles W. Barrow
Robert M. Campbell
Franklin S. Spears
C. L. Ray
James P. Wallace
Ted Z. Robertson
William W. Kilgarlin

Clerk
Garson R. Jackson

Executive Ass't
William L. Willis

Administrative Ass't
Mary Ann Defibaugh

March 28, 1984

Mr. Texas S. Ward, Atty
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El Paso, Texas 79901

Mr. Steven L. Lee, Ass't
General Counsel for State Bar
P.O. Box 12487, Capitol Sta.
Austin, Texas 78711

RE: C-2741: GLEN SUTHERLAND
vs.
THE STATE BAR OF TEXAS

Gentlemen:

Today, the Supreme Court of Texas overruled the motion for rehearing filed in the above referenced case.

Very truly yours,

GARSON R. JACKSON, Clerk

By /s/ Mary M. Wakefield
Chief Deputy